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11/239,757	09/30/2005	Richa Malhotra	Haalen 6-8 (LCNT/127341)	2850

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WALL & TONG, LLP/		DUDA, ADAM K
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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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Ex parte RICHA MALHOTRA and RONALD VAN HAALEN

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Appeal 2011-010741
Application 11/239,757
Technology Center 2400

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Before CARL W.WHITEHEAD, JR, ERIC S. FRAHM, and
ANDREW J. DILLON, *Administrative Patent Judges*.

FRAHM, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Examiner's final
rejection of claims 1, 5, 6, and 8. Claims 2-4 and 7 have been objected to as
containing allowable subject matter, but allowable if amended to include all
of the limitations of the base claim and any intervening claims. Claims 9-27
have been withdrawn. We have jurisdiction under 35 U.S.C. § 6(b).

We reverse.

Illustrative Claim

Claim 1 is illustrative, with key disputed limitations emphasized and lettered bracketing added:

      1.   A method for adjusting a maximum token bucket size of a token bucket at a network node, comprising:

      detecting a packet drop at the network node;

      detecting a reduction of a current token bucket size of the token bucket; and

      [A] *adjusting the maximum token bucket size in response to the packet drop and the reduction of the current token bucket size*.

The Rejection

The Examiner rejected claims 1, 5, 6, and 8 under 35 U.S.C. § 102(b) as anticipated by Izquierdo (US 6,192,032 B1). Ans. 3-5.

ISSUE

Based upon our review of the record, the arguments proffered by Appellants (Br. 10-16) and the findings of the Examiner, we find the following issue to be dispositive of the claims on appeal:

Under § 102, has the Examiner erred in rejecting claims 1, 5, 6, and 8 by finding that Izquierdo discloses limitation [A] as recited in independent claim 1 and recited in remaining independent claim 8*?*

ANALYSIS

Appellants argue (Br. 10-15) that nothing in Izquierdo discloses "adjusting the maximum token bucket size in response to the packet drop and the reduction of the current token bucket size" as recited in claims 1, 5,

and 6. Appellants make similar arguments with respect to the remaining independent claim 8 (*see* Br. 15).

The Examiner relies on Figure 4 and column 8, lines 1-28 of the reference (Ans. 4), and asserts (Ans. 6-9) that the same element (token bucket state 44) can under certain conditions be both the maximum and the current token bucket sizes recited in claim 1 because there are no temporal limitations in the claim. The Examiner's response (Ans. 6-11) to Appellants' arguments in the Appeal Brief does not reasonably articulate how one value can be both the maximum *and* the current token bucket size, when the last clause of each independent claim requires "adjusting the maximum token bucket size in response to the packet drop and the reduction of the current token bucket size" (*see* claims 1 and 8). In other words, even if there is some condition where Izquierdo's token bucket state 44 can be not only the current bucket size, but also turns out to be the maximum bucket size, this is just by sheer coincidence, and this maximum bucket size is never actually *adjusted* in response to packet drop *and* the reduction in current bucket size (i.e., itself), as recited in claims 1 and 8.

We agree with Appellants (Br. 13) that Izquierdo's token bucket state 44 is not equivalent to maximum bucket size. In fact, it appears that Izquierdo, used here for anticipation, fails to envision or deal with *any* value at all having to do with a maximum token bucket size. Although Izquierdo's invention is similar to Appellants' recited invention, Izquierdo does not use, or contemplate using, a "maximum bucket size" (although Izquierdo does disclose monitoring bucket size and detecting bucket overflow). *See* Izquierdo, Fig. 4; col. 8, ll. 1-28.

In this light, Appellants' arguments in the Brief (Br. 10-16) that Izquierdo fails to disclose, teach, or suggest *adjusting* bucket size, and instead, keeps bucket size *constant* as shown in Figures 4 and 6, are persuasive. Appellants' arguments that (i) Izquierdo's token bucket state 44 is not equivalent to maximum token bucket size as recited in claim 1 (Br. 13), and (ii) Izquierdo's token bucket state 44 cannot be both the maximum *and* current token bucket states as asserted by the Examiner (Br. 14), are also persuasive. We agree with Appellants that Izquierdo's bucket size β is reasonably the "maximum token bucket size" recited in claim 1, and that Izquierdo's token bucket state 44 is reasonably the equivalent of the current token bucket size recited in claim 1.

In view of the foregoing, we do not sustain the Examiner's anticipation rejection of claims 1, 5, 6, and 8.

CONCLUSION

Appellants have established that the Examiner erred in rejecting claims 1, 5, 6, and 8 under 35 U.S.C. § 102(b) as being anticipated by Izquierdo because Izquierdo fails to disclose limitation [A] as recited in independent claim 1 and as recited in remaining independent claim 8.[1]

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[1] Our finding is directed to a determination of whether or not Izquierdo anticipates the invention set forth in claims 1, 5, 6, and 8. We make no finding regarding whether or not it would have been *obvious* to adjust the maximum token bucket size in response to a packet drop and a reduction of the current token bucket size (i.e., Izquierdo's token bucket state 44). We leave such a conclusion to the Examiner's consideration during subsequent prosecution.

ORDER

The Examiner's decision rejecting claims 1, 5, 6, and 8 is reversed.

REVERSED

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